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No. 90-1452

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LEAR SIEGLER, INC., a Delaware Corporation,
Petitioner,

v.

RANDALL SCOTT KIRBY,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal District Court and the Eighth Circuit Court of Appeals in this diversity case appropriately applied well-settled principles of Missouri strict products liability substantive law to the facts in this case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. The Design and Operation of the Portable Grain Auger 1

B. Design and Operation of the Top Drive Shaft Guard 2

C. The Accident 3

D. Kirby's Claims at Trial 4

E. Proceedings in the Courts Below 5

SUMMARY OF ARGUMENTS AGAINST GRANTING WRIT 6

ARGUMENT 8

I. THIS IS NOT A PROPER CASE FOR CERTIORARI TO THE UNITED STATES SUPREME COURT BECAUSE: 8

A. There was no violation of the *Erie* doctrine and the principles of federalism incorporated therein, because the federal courts carefully reviewed, analyzed, interpreted and applied Missouri substantive law to the facts in this case, which is what *Erie* requires 8

B. Petitioner is merely dissatisfied with the lower courts' determination as to what Missouri substantive law is, and Petitioner simply seeks through certiorari this Court's review of Missouri state law, which is not an issue of fundamental importance 10

II. THE LOWER COURTS PROPERLY APPLIED WELL-ESTABLISHED MISSOURI SUBSTANTIVE LAW TO THE FACTS IN THIS CASE, IN THAT: 11

A. Missouri courts consistently recognize manufacturers cannot escape liability for defectively designed products when the product is being used in a manner reasonably anticipated, even though such use is not intended by the manufacturer 11

B. Kirby's evidence was that the auger "design" (even with the guards) was defective and unreasonably dangerous when put to a reasonably anticipated use, in that: (1) the operation of the auger required the guards to be periodically removed; (2) the guards were fully detachable when removed; (3) expert testimony corroborated by engineering literature established the foreseeability that guards removed for necessary operations will not be replaced; and (4) there were feasible alternative designs that would minimize the risk that the auger would be operated without the guards in place 18

C. *Gomez* is not the "controlling state court decision," but only one of several decisions carefully reviewed by the lower courts . . . 22

CONCLUSION 24

TABLE OF AUTHORITIES

Cases: Page

Bhagvandoss v. Biersdorf, Inc., 723 S.W.2d 392 (Mo. banc 1987 . . . . . 6, 7, 9, 10, 13, 14, 23
Bishop v. Wood, 426 U.S. 341 (1976) 10
Commissioner v. Bosch, 387 U.S. 456 (1967) 10
Cryts v. Ford Motor Co., 571 S.W.2d 683 (Mo. App. 1978) 13
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 6, 7, 8
Fahy v. Dresser Industries, Inc., 740 S.W.2d 635 (Mo. banc 1987) 7, 12
Gomez v. Clark Equipment Co., 743 S.W.2d 429 (Mo.App. 1987) 5, 8, 10, 15, 22, 23, 24
Higgins v. Paul Hardeman, Inc., 457 S.W.2d 943 (Mo. App. 1970) 12
Hillsborough Township v. Cromwell, 326 U.S. 620 (1945) 10
Jarrell v. Fort Worth Steel and Manu. Co., 666 S.W.2d 828 (Mo.App. 1984) 12
Love v. Deere & Co., 684 S.W.2d 70 (Mo. App. 1985) 15, 16
Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371 (Mo. banc 1986) 6, 7, 9, 10, 12, 13, 14, 15, 23
Rogers v. Toro Manu. Co., 522 S.W.2d 632 (Mo.App. 1975) 12
Runyon v. McCrary, 427 U.S. 160 (1976) 10
Vanskike v. ACF Industries, Inc., 665 F.2d 188 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) 16, 17, 23, 24

Other Authorities:

Missouri Approved Instruction 25.04 12

STATEMENT OF THE CASE

Respondent Kirby is dissatisfied with the Statement of the Case reported by Lear Siegler, Inc., in its Petition. To understand the lower courts' rulings, a thorough understanding of Kirby's evidence is necessary. Many evidentiary facts are omitted regarding: (1) design and operation of the auger; (2) the design and operation of the auger drive shaft guards; and (3) the anticipated use of the auger with the drive shaft guards removed. Certain procedural matters equally critical to understanding the lower courts' rulings were also omitted. Therefore, in compliance with Supreme Court Rules 15.1 and 24.2, the following evidentiary facts are provided in order to supplement Petitioner's Statement of the Case.

A. The Design and Operation of the Portable Grain Auger

The machine that injured Kirby was a Hutchinson Century Model 51-foot long, 10-inch diameter portable grain auger manufactured and sold in 1979 by Petitioner Lear Siegler, Inc. The auger was used by Kirby's employer to move grass seed from the warehouse floor in a storage facility into a trailer for transportation. The auger carries the seed through a 10-inch diameter housing by means of a rotating corkscrew flighting inside the housing. The corkscrew flighting is powered by a drive shaft located on the top of the housing along the entire length of the auger. The drive shaft is PTO-driven and rotates at a rate of approximately 500 rpm. Sections of the drive shaft are connected by couplers secured by shear pins. The auger is designed so that a pin will shear in the event of overloading. This protects the rest of the power system.

The corkscrew flighting inside the auger was supported by three internal bearings located inside the housing at various intervals. These internal bearings were also located underneath the top drive shaft. Access to the internal bearings was necessary for service and

maintenance. Additionally, access was necessary because the internal bearings created obstructions in the flighting causing the auger to clog. The first of the three internal bearings is the most likely location where the auger will clog. Since the auger has no reversing mechanism, access must be gained to this internal bearing in order to remove material clogging the auger.

Access to the internal bearings is gained through "inspection holes." These inspection holes are located on top of the auger housing, directly underneath the top drive shaft. The first inspection hole is covered by a metal "sleeve" that surrounds the auger housing. To gain access to the internal bearing, the guard over the top drive shaft must be removed and then the operator must slide back the sleeve that covers the inspection hole. To accomplish this, the operator normally reaches over the drive shaft in order to grasp each side of the sleeve.

B. Design and Operation of the Top Drive Shaft Guard

The auger was manufactured and sold with metal guards over the drive shaft. These guards were sheet metal and came in approximately five-foot sections. They were attached to the auger with screws at each end of the guard. Witnesses described them as "cumbersome with sharp edges." In order to remove the guard, the operator must use a tool (a screwdriver or wrench) to remove the screws from each end. Once removed, the guard is completely detached from the auger. To replace the guard, the operator must use a tool to reinsert the screws at each end of the guard. This removal and replacement process takes approximately five minutes.

The evidence was that, during ordinary operation of the auger, the guards over the lower sections of the top drive shaft had to be removed for a variety of reasons. These included:

1. To gain access to the inspection hole in order to perform necessary maintenance on the internal bearings.

2. To gain access to the inspection hole in order to remove objects caught on the internal bearing which, in effect, obstructs the pathway of moving material through the corkscrew flighting.

3. To replace shear pins in the drive shaft coupler which sheared when the auger:

   (a) clogged from foreign objects caught on the internal bearings;

   (b) was started under load; and

   (c) became overloaded.

4. To reach the grease zerk located near each inspection hole which required lubrication once every ten hours of operation.

Furthermore, Petitioner's corporate representative admitted that removal of the drive shaft guards was completely foreseeable to the manufacturer and was not a misuse of the product.

C. The Accident

Kirby had worked for his employer approximately two months prior to the accident. He was primarily a truck driver who hauled truckloads of seed back and forth between his employer's warehouses. Prior to the date of the accident, Kirby had worked around the auger only under the supervision of a senior employee. However, on the day of the accident, he was, for the very first time, the person placed in charge of operating the auger.

During the course of operating the auger, Kirby noticed the auger had clogged. He turned off the tractor powering

the auger in order to remove the clog from the inspection hole. The metal guards over the drive shaft had been removed by Kirby's employer prior to his employment. At the time he was injured, Kirby was not aware of the existence of guards that were supposed to cover the drive shaft.

After Kirby cleaned the clog out of the auger, he started the tractor which engaged the PTO. The sleeve over the inspection hole was left open in order for Kirby to see that grain was moving up the auger. Once this was evident, Kirby climbed off the tractor in order to close the inspection hole. This procedure was done with the power on in order to reduce the risk of shearing a pin in the drive shaft by restarting the auger under full load. To close the inspection hole, Kirby reached over the rotating drive shaft in order to grasp the sleeve and push it over the inspection hole. This method was followed by Kirby's co-employees as well.

Before Kirby could close the inspection hole, the rotating drive shaft grabbed his shirt sleeve, pulling his left arm and body into the auger. He was unable to pull away until his shirt was ripped from his body. He suffered severe and permanent injuries to his left arm and hand requiring six surgeries and three hospitalizations. According to his physician, his left upper extremity is 66% permanently disabled.

D. Kirby's Claims at Trial

Kirby claimed that the auger, when designed, manufactured and sold, was defective and unreasonably dangerous when used in a manner reasonably anticipated by the manufacturer. Kirby's theory of the case was that the designed guarding system was inadequate and defective at the time the auger was sold because:

(1) it was foreseeable and necessary for the top drive shaft guards to be removed for ordinary operation of the auger;

(2) use of the auger without the guards in place was foreseeable to the manufacturer and an anticipated use of the auger;

(3) with the guards removed the exposed drive shaft, which rotated at approximately 500 rpm, presented a substantial risk of serious injury to the operator and bystanders; and

(4) numerous design alternatives were available at the time the auger was manufactured that would have eliminated and/or substantially minimized the risk that the auger would be operated without the guards covering the rotating drive shaft.

Kirby presented substantial evidence at trial supporting his theory of the case which justified the district court's submission of his claim to the jury.

E. Proceedings in the Courts Below

The issue now raised by Petitioner was first presented to the district court in Petitioner's Motion for Partial Summary Judgment. Petitioner claimed that the removal of the drive shaft guards was a legally significant modification that rendered the auger unsafe and thereby excused Petitioner's liability under the Missouri Court of Appeals' decision in *Gomez v. Clark Equipment Co.*, 743 S.W.2d 429 (Mo.App. 1987). Accompanying its motion, Petitioner filed ten pages of suggestions supporting its interpretation of Missouri law. In response, Kirby filed 22 pages of written Suggestions in Opposition to Petitioner's motion. Kirby's suggestions discussed not only the *Gomez* decision, but also (1) eight additional Missouri state court opinions that address the issues of manufacturer's liability for not only foreseeable uses, but also for foreseeable misuses of its product; (2) the most recent Eighth Circuit Court of Appeals' decision addressing this issue under Missouri law; and (3) a comprehensive statement of the evidence supporting Kirby's theory of his case. Considering all of the applicable Missouri opinions and

Kirby's evidence, the district court overruled Petitioner's Motion for Partial Summary Judgment.

The issue was next raised in Petitioner's Motion for Judgment Notwithstanding the Verdict. The district court's Order overruling this motion again carefully considered Missouri law. In its Order, the district court discussed the Missouri Supreme Court opinions of *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371 (Mo. banc 1986), and *Bhagvandoss v. Biersdorf, Inc.*, 723 S.W.2d 392 (Mo. banc 1987), which both held manufacturers liable for misuses of their products which were "reasonably anticipated" by the manufacturers. The district court concluded that since the auger was designed so that the guards must be removed, the failure to replace them following removal "does not constitute a modification as to relieve the manufacturer of liabiiity." (Lear Siegler's Petition, page 7A.)

The issue was next raised before a three-judge panel in the Eighth Circuit Court of Appeals. The issue of the applicable Missouri law was again briefed by both parties. Additionally, the case was argued orally before the panel. Against this background, the Eighth Circuit Court of Appeals issued a *per curiam* opinion stating, "After carefully reviewing the record and hearing oral argument, we find no prejudicial error of law or fact. We affirm the judgment of the district court on the basis of its well-reasoned opinion." (Lear Siegler's Petition, pages 1A and 2A.)

SUMMARY OF ARGUMENTS AGAINST GRANTING WRIT

This is not a proper case for certiorari to the Supreme Court for several reasons. First, the lower federal courts did not violate the well-established principles of federalism set forth in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny. Moreover, the lower federal courts were provided extensive briefs and heard argument

of counsel concerning application of Missouri law to the facts in this case. There is every indication that the federal judges carefully considered the arguments presented to them. They concluded that use of the auger with the guards removed was a reasonably anticipated use based on the evidence and Missouri law. This is precisely what the *Erie* doctrine requires -- ascertainment of the state law applicable to the facts of the case. Petitioner is using the *Erie* doctrine as a bootstrap to obtain an additional forum to hear its argument as to what Missouri substantive law is -- an argument that has been rejected by four federal judges who study and work with Missouri substantive law on a regular basis. Furthermore, Petitioner raises no issue that otherwise satisfies the considerations governing review on Writ of Certiorari set forth in Supreme Court Rule 10.1.

In any event, the results reached by the four federal judges that reviewed this issue are consistent with and fully supported by numerous decisions by the Missouri Supreme Court and Court of Appeals. Under the doctrine of strict products liability, Missouri cases have long recognized that a manufacturer is liable for design defects that result from the anticipated use of its product. *Bhagvandoss v. Biersdorf, Inc.*, 723 S.W.2d 392, 396 (Mo. banc 1987); *Fahy v. Dresser Industries, Inc.*, 740 S.W.2d 635, 637-38 (Mo. banc 1987); *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 381 (Mo. banc 1986). These Missouri Supreme Court opinions all recognize that a manufacturer may be liable even though the product would not have caused injury when used properly, if the use which caused the injury was reasonably anticipated by the manufacturer.

Kirby's theory of the case focused on the defective and unreasonably dangerous "design of the auger" when manufactured and sold with fully detachable guards that were cumbersome and time-consuming to remove, but nevertheless had to be removed frequently during the ordinary operation of the auger. Moreover, the removal and nonreplacement of the drive shaft guards is the very

"anticipated use" for which a manufacturer can be held liable under the aforementioned Missouri case law. Kirby presented substantial evidence to support his theory of the case.

Finally, Petitioner relies on *Gomez v. Clark Equipment Co.*, 743 S.W.2d 429 (Mo.App. 1987), in a vacuum, which is extremely misleading. When considered in light of other Missouri cases addressing the same issue, *Gomez* does not dictate a different result in the present case.

ARGUMENT

(Answering Petitioner's Point 1B)

I. THIS IS NOT A PROPER CASE FOR CERTIORARI TO THE UNITED STATES SUPREME COURT BECAUSE:

A. There was no violation of the *Erie* doctrine and the principles of federalism incorporated therein, because the federal courts carefully reviewed, analyzed, interpreted and applied Missouri substantive law to the facts in this case, which is what *Erie* requires.

There is no dispute that the *Erie* doctrine and its progeny required the federal district court in this diversity action to apply Missouri substantive law. Similarly, there can be no legitimate dispute that the district court and the court of appeals in fact did apply Missouri substantive law to the facts in this case. The district court judge reviewed briefs that discussed, analyzed and argued application of Missouri law to the facts in this case. Similarly, the three-judge court of appeals panel reviewed briefs and heard argument of counsel which discussed, analyzed and argued application of Missouri law to the facts in this case.

Furthermore, the district court, through his presence during the trial, and the court of appeals, through the thorough, detailed statement of facts contained in the

thorough, detailed statement of facts contained in the briefs of counsel as well as their oral arguments, were eminently familiar with the theory of Kirby's case and the evidence supporting his theory. In its order overruling Petitioner's Motion for J.N.O.V., the district court discussed two Missouri Supreme Court *en banc* decisions, which clearly recognize that the concept of "reasonably anticipated use" (1) includes misuse and abnormal use which is objectively foreseeable; and (2) allows recovery for injury which would not have occurred had the product been used properly when the misuse is foreseeable (Lear Siegler's Petition, page 7A, citing and discussing *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371 (Mo. banc 1986) and *Bhagvandoss v. Biersdorf, Inc.*, 723 S.W.2d 392 (Mo. banc 1987)). Based on its knowledge of Kirby's theory, the evidence and Missouri substantive law, the district court concluded that there was substantial evidence that use of the auger with the guards removed was foreseeable and could be reasonably anticipated by the manufacturer.

On appeal, the three-judge panel similarly reviewed Missouri law in connection with the evidence in this case and reached the same conclusion as the district court. Moreover, the court of appeals commended the district court's application of the law to the facts in this case stating, "We affirm the judgment of the District Court on the basis of its well-reasoned opinion." (Lear Siegler's Petition, page 2A.) Accordingly, there is every indication the district court's application of Missouri law to the facts in this case was proper.

B. Petitioner is merely dissatisfied with the lower courts' determination as to what Missouri substantive law is, and Petitioner simply seeks through certiorari this Court's review of Missouri state law, which is not an issue of fundamental importance.

In the lower courts, Petitioner took the position that *Gomez* repudiated the theory that a "foreseeable misuse" could constitute an anticipated use by the manufacturer. This argument was rejected by the lower courts on the basis that it was inconsistent with and clearly contrary to the recent Missouri Supreme Court decisions of *Nesselrode* and *Bhagvandoss*. Dissatisfied with its results in the lower courts, Petitioner now seeks through writ of certiorari yet another forum to argue its interpretation of Missouri substantive law.

While an important issue to the parties in this case, this Court's interpretation and application of Missouri state law to this case does not rise to the level of fundamental importance necessary to invoke the discretionary jurisdiction of this Court. This issue is no different than interpretation and application of any state's law to the facts in any particular case. In the present case, this very determination was made by the district court, and was reviewed and affirmed by the court of appeals.

Moreover, this Court on numerous occasions has recognized the superior position of the lower courts to determine questions of state law due to their familiarity with the intricacies and trends of local law and practice.[1]

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1 See Commissioner v. Bosch, 387 U.S. 456, 462 (1967) ("The issue presents solely a question of state law and '[w]e ordinarily accept the determination of local law by the court of appeals . . . and we will not disturb it here.'"); Runyon v. McCrary, 427 U.S. 160, 181 (1976) ("The court has accepted the interpretation of state law in which the district court and the court of appeals have concurred even if an examination of the state law issue without such guidance may have justified a different conclusion."); Bishop v. Wood, 426 U.S. 341, 345-46 (1976) (holding the same and refusing to overturn district court's interpretation of a North Carolina state statute); and Hillsborough Township v. Cromwell, 326 U.S. 620, 629-30 (1945) (in refusing to overrule the district court's interpretation of (continued...)

With their familiarity with Missouri law, the district court and court of appeals judges were certainly qualified to determine and apply Missouri law to the facts in this case. Finally, the issue raised by Petitioner does not otherwise satisfy the considerations governing review of writ of certiorari set forth in Supreme Court Rule 10.1.

For these reasons, the issue raised by Petitioner does not rise to the level of fundamental importance warranting imposition of the discretionary jurisdiction of this Court through writ of certiorari. Accordingly, Petitioner's Writ should be denied.

(Answering Petitioner's Point 1A)

II. THE LOWER COURTS PROPERLY APPLIED WELL-ESTABLISHED MISSOURI SUBSTANTIVE LAW TO THE FACTS IN THIS CASE, IN THAT:

A. Missouri courts consistently recognize manufacturers cannot escape liability for defectively designed products when the product is being used in a manner reasonably anticipated, even though such use is not intended by the manufacturer.

Under Missouri law, the essential elements of a strict liability case, as applied in this case, are:

(1) the defendant sold or manufactured the auger in the course of its business;

(2) the auger was in a defective condition, unreasonably dangerous when put to a reasonably expected use;

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[1](...continued)
applicable New Jersey law, this Court held, "On such questions, we pay great deference to the views of the judges of those courts 'who are familiar with the intricacies and trends of local law and practice.'").

(3) the auger was used in the manner reasonably anticipated; and

(4) plaintiff was damaged as a direct result of a defective condition that existed when the auger was sold.

Fahy v. Dressler Industries, Inc., 740 S.W.2d 635, 637-38 (Mo. banc 1987). *See also*, Missouri Approved Instruction 25.04. These elements were set forth in the district court's order denying Petitioner's Motion for Summary Judgment (Lear Siegler's Petition, page 13A). Therefore, the district court was clearly aware that for Kirby to make a submissible case under Missouri law he must present substantial evidence that: (1) the auger was defective and unreasonably dangerous at the time it was sold (with the guards); and (2) the auger was being used at the time Kirby was injured (without the guards) in a manner reasonably anticipated by the manufacturer.

Review of Missouri case law makes one thing evident -- Petitioner's liability is determined by the "reasonably anticipated use" of its product, rather than Petitioner's subjective intention about how it should be used. "The test of whether a product is defective when sold is whether the product is unreasonably dangerous to a consumer or user *given the conditions and circumstances that will foreseeably attend the use of the product.*" *Jarrell v. Fort Worth Steel and Manu. Co.*, 666 S.W.2d 828, 836 (Mo.App. 1984) (emphasis added). The reasonably anticipated use of a product encompasses all of its "objectively foreseeable uses, including foreseeable uses which the manufacturer might consider a misuse of its product." *Nesselrode*, 707 S.W.2d at 381 (concept of reasonably anticipated use includes misuse and abnormal use which is objectively foreseeable). *See also, Rogers v. Toro Manu. Co.*, 522 S.W.2d 632, 637-38 (Mo.App. 1975) (concept of reasonably anticipated use includes misuse and abnormal use which is objectively foreseeable); *Higgins v. Paul Hardeman, Inc.*, 457 S.W.2d 943, 948 (Mo. App. 1970) (foreseeble use may

be different from intended use, and include any particular use which should be known to a reasonably prudent manufacturer). For example, involvement of an automobile in a collision is a reasonably anticipated use of a product, even though it is not the intended use of the product. *See Cryts v. Ford Motor Co.*, 571 S.W.2d 683, 688 (Mo. App. 1978). Under the concept of reasonably anticipated use, reduced to its simplest terms, the Missouri Supreme Court has stated, "[a] product may be unreasonably dangerous and defective even though it would not have caused injury when used properly, if the actual use is one reasonably anticipated by the manufacturer." *Bhagvandoss v. Biersdorf, Inc.*, 723 S.W.2d 392, 396 (Mo. banc 1987).

A closer look at these cases clearly indicates that, under Missouri law, Kirby was entitled to recover if he proved use of the auger with the guards removed was reasonably anticipated. In *Nesselrode* (cited and relied on by the district court), plaintiff's decedent died in a small aircraft accident caused by the improper installation of the actuators.[2] The actuators are installed on each side of the airplane, and in this case the actuator for the right side had been installed on the left side of the airplane and vice versa. Reversing proper placement of the actuators caused the trim tabs to move in an opposite direction, resulting in the fatal airplane crash. *Nesselrode*, 707 S.W.2d at 374.

Plaintiff claimed the actuators were defectively designed in that they were visually identical, but functionally distinct, and, as such, were capable of being interchanged - i.e., reversed -- during installation. *Id.* at 374-75. Defendant asserted it was entitled to judgment as a matter of law because "the evidence proves the actuators were used in an abnormal fashion not intended by the manufacturer . . . and that the manufacturer could not reasonably have anticipated the reverse installation of the

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2 "Actuators" are mechanical parts which allow the pilot to increase his altitude by trimming the airplane.

two actuators." *Id.* at 380. Reviewing Missouri's product liability cases, the Missouri Supreme Court clearly recognized, "the concept of reasonably anticipated use, however, includes misuse and abnormal use which is objectively foreseeable." *Id.* at 380-81. The court then summarily rejected defendant's argument that the negligent installation was as a matter of law a superseding cause sufficient to relieve it of any liability, stating:

> "This argument, however, is one that we cannot in good conscience accept. The plaintiff's entire stratagem was directed toward proving the incorrect installation of physically symmetrical but functionally asymmetrical parts was a natural and expected consequence of manufacturing actuators without "Murphy proof" design features. We find the evidence legally sufficient to support a finding that Beechcraft's design was a proximate cause of George Nesselrode's death. "

Id. at 381-82. The court concluded that the jury was "free to infer that an alternative design would have been safer and would have prevented the accident" and that it was "the function and duty of the jury to reason upon the evidence presented . . . ." Clearly, *Nesselrode* supports the lower courts' reasoning in the present case.

Further support of the lower courts' reasoning is found in *Bhagvandoss v. Biersdorf, Inc.*, 723 S.W.2d 392 (Mo. banc 1987). This case involved the use of an adhesive compression-type bandage manufactured by defendant and used to dress plaintiff's surgical wounds. The product was *not* a sterile product and was *not* sold as such. However, it was used to tape dressings to plaintiff's surgical wound. Soon after the bandage was applied, plaintiff's wound became infected, causing significant complications. The manufacturer asserted that (1) since the bandage was not sterile and not sold as such, its use to bandage an open wound was not proper; and (2) such use was not reasonably anticipated by appellant. *Id.* at 395, 396. Again, the Supreme Court of Missouri -- citing its earlier

opinion in *Nesselrode* -- stated, "a product may be unreasonably dangerous and defective even though it would not have caused injury when used properly, if the actual use is one reasonably anticipated by the manufacturer." Accordingly, the verdict in favor of plaintiff was affirmed.

An additional case directly on point is *Love v. Deere & Co.*, 684 S.W.2d 70 (Mo. App. 1985). *Love* was decided by the same court that decided *Gomez*. In this case, plaintiff was injured when he became entangled in an unguarded area of belts and pulleys on the left side of the combine. As the combine was originally manufactured and sold, this area was guarded by a shield. Defendant's argument was that plaintiff had failed to make a defective design case because there was no proof that the injury would have occurred if the shield had been in place. (This is one argument advanced by Petitioner in the present case.) However, the court recognized that plaintiff's claim was that the design of the guard was defective in that the guard fractured as a result of sympathetic vibrations with the belt and pulley mechanism to which the guard was attached. This resulted in the guard's failure and ultimate detachment from the combine. The court rejected defendant's argument concerning the adequacy of the guard *at the time the combine was sold*, stating:

> "The adequacy of the banana shield to guard the machinery when in its original configuration was irrelevant to plaintiff's case and, in fact, was a subject expressly withdrawn from the jury's consideration. For purposes of the claim, the assumption may be indulged, without detracting from plaintiff's substantive burden of proof, that the shield would have protected Love from injury had it remained attached to the combine."

Id. at 74. Defendant also advanced the argument that the use of the combine without the shield securely attached was an unanticipated use (virtually identical to Petitioner's

argument in the present case). In rejecting this argument, the court stated:

> "When Love's accident happened, the machine was being used for its designed purpose to combine crops. There is nothing unforeseeable about the continued use of the machine after failure of the shield. In fact, the evidence showed that respondent was aware that farmers would not interrupt their work because a guard shield became detached, but were more likely to postpone repair of a component which did not directly serve their combining function."

Id. at 76.

The claims in *Love* are virtually identical to the claims in the present case. The plaintiffs in both cases claimed that, by virtue of the original defective design of the guard, the machine was defective and unreasonably dangerous when put to a reasonably anticipated use. Defendants in both cased claimed that, had the guard been in place, no injury would have happened and use of the machine without the guard in place is not reasonably anticipated. The *Love* court rejected the defendant's claim outright. The rationale and result in *Love* further support the result reached by the lower courts in the present case.

Finally, *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), which interpreted and applied Missouri law, further supports the lower courts' result. Vanskike's arm was crushed when he hit a metal hitch with a hammer and the hitch tell on his arm. The hitch collapsed because someone had removed the retaining rings designed to hold the hitch in place. Vanskike's expert testified that the hitch design was defective because it permitted the retaining rings to come out, and it was foreseeable that the hitch would be operated without the retaining rings. ACF argued it was not liable for Vanskike's injuries since the hitch was not in the same condition (i.e., the retaining rings were missing)

when he was injured as when the hitch was sold (with retaining rings). The Eighth Circuit held that Vanskike made a submissible case under Missouri law on the issue of reasonably anticipated use and that the foreseeable alterations in the hitch did not absolve ACF of liability:

> "[S]ubsequent changes or alterations in the product do not relieve the manufacturer of strict liability if the changes were foreseeable and the changes did not unforeseeably render the product unsafe . . . . According to Dr. Somerset's [Vanskike's expert] testimony, the hitch's designers should have foreseen that the hitches would on occasion be operated without retaining rings. That is in fact what happened . . . . Although ACF may have intended that the hitches only be utilized with the retaining rings in place, Dr. Somerset testified that it was inevitable that the retaining rings come off and that the hitches would be operated without the retaining rings in place. Therefore, the Vanskikes did present evidence that the hitch was being used in a manner reasonably anticipated by ACF."

Id. at 195-96.

In summary, the cases reviewed and relied on by the lower courts clearly establish that an injured person makes a submissible defective product design case under Missouri law where they present substantial evidence that (1) the product was defective and unreasonably dangerous *at the time it was manufactured and sold*; and (2) the product was being used in a reasonably anticipated manner when it caused the injury. The jury found these issues in Kirby's favor. Subsequently, the lower courts reviewing the evidence found Kirby made a submissible case on this issue. Their findings are clearly consistent with Missouri law.

B. Kirby's evidence was that the auger "design" (even with the guards) was defective and unreasonably dangerous when put to a reasonably anticipated use, in that: (1) the operation of the auger required the guards to be periodically removed; (2) the guards were fully detachable when removed; (3) expert testimony corroborated by engineering literature established the foreseeability that guards removed for necessary operations will not be replaced; and (4) there were feasible alternative designs that would minimize the risk that the auger would be operated without the guards in place.

Kirby introduced substantial evidence of the type relied on in the aforementioned cases to establish his theory at trial. Throughout the trial, Kirby's claim was that the auger was defective and unreasonably dangerous at the time it was manufactured and sold due to a combination of design factors, but most notably the removable drive shaft guards.[3] Kirby's evidence that, due to the design of the auger, it was reasonably anticipated that the auger would be operated without the guards in place included the following:

1. Frequent guard removal during ordinary operation of the auger.

The drive shaft guards had to be removed for a variety of reasons during the ordinary operation of the machine. The guards had to be removed in order to:

(1) Gain access to the inspection hole in order to perform necessary maintenance on the internal bearings;

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3 Other design factors were those which contribute to the removal of the drive shaft guard. These include the presence of the internal bearing; the presence of the inspection hole located directly underneath the drive shaft; and the use of couplers secured by shear pins which sheared when the auger became clogged or overloaded.

(2) Gain access to the inspection hole in order to remove objects caught on the internal bearing which, in effect, was an obstruction in the path of moving material through the corkscrew flight;

(3) Replace pins and bolts in the drive shaft coupler which sheared when the auger:

a. clogged from foreign objects caught on the internal bearing;

b. was started under load;

c. became overloaded with seed; and

(4) Reach the grease zerk located near the inspection hole, which is required once every ten hours of operation on the auger.

Furthermore, it was admitted by Petitioner's corporate representative that removal of the drive shaft guard was completely foreseeable to the manufacturer and not a misuse of the product.

2. The guards were fully detachable when removed.

The drive shaft guards were bent sheet metal guards, approximately 5 feet long. They were cumbersome, with sharp edges. These metal guards were attached to the auger with screws at each end of the guard. In order to remove the guard, the operator must use a tool (a screwdriver or wrench) to remove the screws from each end. Once removed, the guard is completely detached from the auger. It can be set aside, misplaced, or damaged. To replace the guard, the operator must again use a tool to reinsert the screws at each end of the auger. This removal and replacement process takes approximately five to ten minutes. Often it had to be done repetitively because the texture of the seed being transported would cause the auger to clog repeatedly.

3. Foreseeability that guards would not be replaced.

Plaintiff presented substantial evidence which established that, in the real world, guards which must be removed for ordinary operation of a machine will be discarded and not replaced. This evidence was presented first through the testimony of plaintiff's two design engineers. These experts corroborated their testimony with a generous amount of engineering literature documenting this fact which dated back to 1917.[4]

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[4] Examples include the following:
Machinery's Encyclopedia (publication date 1917) -- "In many cases of injuries to operators caused by the absence of a suitable safeguard, it will be found that the safeguard has been removed or rendered ineffective by the employee . . . . Sometimes, however, so-called "guards" are encountered which are not guards at all but rather, delusions, indicating that the designer had appearance rather than utility in mind . . . . Many designers seem to believe that everything which looks like a cover for a part of a machine constitutes an effective safeguard, but it is not true if no regard is paid . . . to the likelihood of the guard being left off permanently . . . . It is important that the guards for machines are so designed and applied so that there is no temptation for the workmen to throw them aside as cumbersome. To educate the employee to use caution about dangerous machines is difficult enough, and it should not be rendered more so by making him work with an impractical safeguard."
Proceedings of the 45th Annual Convention of the Farm Equipment Institute (conducted in 1938) -- "As we collectively study how better to guard and protect the moving parts of the machines we manufacture, we expect to discover better and simpler means of accomplishing the job. Our immediate problem is just how to induce the farmer to keep the guards, that are now supplied for his protection, in place. We want to bear this in mind and we want you to help us on that. Every machine that is sent out that needs guards has guards on it. We also know, if you go to a farm, you will find most of the guards discarded, lost or not used."

(continued...)

Additionally, Petitioner's corporate representative admitted at trial that his company was aware that operators used their augers without the drive shaft guards in place. This was substantial evidence that it could be reasonably anticipated by the manufacturer that this auger would be used without the drive shaft guards in place.

4. Feasible alternative designs were presented to the jury.

In connection with Kirby's expert testimony, a number of feasible alternative designs were presented to the jury. These alternative designs would eliminate the risk posed by the rotating drive shaft altogether, or at least minimize the risk that the auger would be operated without the guards in place. The alternative designs included:

(1) Elimination of the top drive shaft altogether and driving the auger by means of a bottom drive shaft, a direct side drive shaft or hydraulically. Competitors manufacture and sell augers driven by these alternative designs.

(2) Providing "hinged" guards over the existing top drive shaft. This would allow ease of access to the couplers and inspection hole while making the guard a permanent part of the auger.

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[4](...continued)
Accident Prevention Manual for Industrial Operations, 4th Edition (published by National Safety Council, 1964) -- "A common complaint is that removal and nonreplacement of a machine guard is the cause of an accident. However, a more fundamental cause often lies in the root of the matter. Guards lying about do not necessarily indicate carelessness on the part of the operator, but show an inability of the guard designer to solve the problem."

(3) Providing interlock mechanical guards designed in such a way that unless the guard were in place, the drive line would not operate.

(4) Providing alternative coupling designs that would eliminate the need for roll pins which protrude from the coupling design incorporated by Petitioner. Splined couplings and keyed couplings were two alternatives suggested.

(5) Providing an adequate warning near the drive shaft to advise the operator of the severity of the risk posed by the rotating drive shaft.

Evidence of these feasible alternative designs allowed the jury to determine whether or not the auger design was defective and unreasonably dangerous.

The foregoing evidence supports the lower court's conclusion that plaintiff made a submissible case on the theory that the auger was defectively designed when put to a reasonably anticipated use. The jury could conclude from the evidence that ordinary operation of the auger required removal of the guards, and that it was foreseeable and reasonably anticipated that the guards would not be replaced. Thus, the lower courts' rulings were entirely consistent with Missouri law.

C. *Gomez* is not the "controlling state court decision," but only one of several decisions carefully reviewed by the lower courts.

As demonstrated above, *Gomez v. Clark Equipment Co.*, 743 S.W.2d 429 (Mo.App. 1987), is but one of a number of Missouri decisions addressing the issue of reasonably anticipated use. Since there are a number of Missouri Supreme Court decisions directly on point, *Gomez* cannot be considered "the controlling state court case," as Petitioner claims. Therefore, to the extent the lower courts rejected Petitioner's interpretation of *Gomez*, the

courts should not be accused of failing to follow the controlling law of the state of Missouri.

In any event, *Gomez* would not prohibit recovery in the present case. The subsequent modification in *Gomez* involved replacement of an original fuel tank on a lift truck with a fuel tank which obscured plaintiff's vision when driving the lift truck in reverse. Plaintiff was injured when she backed into a support post while driving the lift truck in reverse, crushing her hand. She was unable to see the support post due to the taller fuel tank. The *Gomez* court, in essence, concluded that there was no evidence that the lift truck was unsafe in the condition it was manufactured and sold by defendant. *Id.* at 433.

However, the *Gomez* court did not paint with the broad brush suggested by Petitioner. The court did not attempt to eliminate the reasonably anticipated use doctrine described in *Nesselrode* and *Bhagvandoss*. Moreover, the *Gomez* court conceded that where there is evidence that the product is defectively designed in such a manner that the modification is foreseeable, then the manufacturer is liable. In reviewing the results reached in *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188, (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), the *Gomez* court acknowledged that certain retaining rings had been removed from a railroad car hitch by a third person, allowing the roller pins to fall out, causing the hitch to collapse and resulting in plaintiff's injuries. *Id.* at 433. The *Gomez* court nevertheless agreed that this was not an intervening cause based on the evidence presented at trial, stating:

> "However, the removal of the retaining rings was not a superseding cause of injuries because there was expert testimony that the hitch was defectively designed so that it would not hold the retaining rings at all. Unlike the case of *Vanskike*, *supra*, in the present case there was no evidence of any defect in the truck as provided by the respondent."

Id. at 433. Applying the *Gomez* court's analysis to the present case, there is substantial evidence that supported the jury's finding that the auger would be operated without the drive shaft guards in place due to the defective design of the auger, and specifically the defective design of the guards. There was also substantial evidence that the auger was defectively designed and unreasonably dangerous at the time it was provided (manufactured and sold) by Petitioner. Therefore, upon careful analysis the results reached in this case by the lower courts would not have been different, even under Petitioner's interpretation of *Gomez*.

CONCLUSION

For the aforementioned reasons, respondent respectfully requests the Court to deny the Petition for Writ of Certiorari and for such other relief as this Court deems appropriate under the circumstances.

Respectfully submitted,

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